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Attorneys for Defendants William Tull, Daniel Gibby and
Gibby Novelties, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PAUL MONTWILLO, an individual

Plaintiff,

vs.

WILLIAM TULL; DANIEL GIBBY;
GIBBY NOVELTIES, LLC dba ARSENIC
& APPLE PIE, a California Limited
Liability Corporation and DOES 1 through
20, inclusive,

Defendants.

) CASE NO. C 07 3947 SI
)
)
) AFFIDAVIT OF WILLIAM TULL IN SUPPORT
) OF OPPOSITION TO PLAINTIFF'S MOTION
) FOR SUMMARY JUDGMENT
)
) April 25, 2008
) 9:00 a.m.
) Judge Illston, Courtroom 10
)
) The Federal Building
) 450 Golden Gate Avenue
) San Francisco, CA 94102

And Related Counter-Claim of Tull

Complaint filed: August 1, 2007

The Undersigned, William Tull, does hereby state and declare as follows:

1. I am one of the Defendants and the Cross-Claimant in the above-captioned
matter and submit the following in support of Defendants' Opposition to Plaintiff's
MONTWILLO V. TULL, ET AL. USDC Action No. C 07 3947 SI

AFFIDAVIT OF WILLIAM TULL IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

1 Motion for Summary Judgment;

2 2. The following facts are based on my personal knowledge of same, having
3 personally witnessed the events and facts described, except as to those matter
4 stated on information and belief and as to said matters I believe them to be true;

5 3. In January of 1997, my store, In-Jean-lous, was sued by Mattel, Inc., USDC
6 Case No. C97-0012 EFL, in regard to the sales of satirical dolls based on the
7 Barbie doll line produced by Paul Montwillo, then known as "Paul Hansen".
8 While I was unaware of the dolls being sold in my store until then, I was forced to
9 retain legal counsel to represent and defend my store against trademark
10 infringement and other claims made by Mattel's attorneys. In May of 1997, I
11 settled the matter with Mattel on behalf of In-Jean-lous. A true and correct copy
12 of the Agreement is attached as Exhibit 1. In the agreement, I agreed to a
13 permanent injunction to refrain from:

- 14 1. producing, selling, advertising or distributing any dolls based on
15 Mattel's Barbie line,
- 16 2. imitating or copying Mattel's copyrights to the Barbie line,
- 17 3. imitating, copying or using the Barbie line packaging, including it's
18 specific shade of pink, the yellow or white wording, or the Barbie
19 trademarks,
- 20 4. imitating or copying the unique proportions of the Barbie "hour-glass"
21 shaped body, and the particular set of facial features known as
22 Barbie,
- 23 5. imitating or copying the body shape or facial features of the Ken doll,
24 and
- 25 6. Assisting or aiding any other person or entity to violate the above
26 terms.

27 4. In July of 1997, I and Paul Montwillo agreed to enter into a partnership called

28 MONTWILLO V. TULL, ET AL. USDC Action No. C 07 3947 SI

1 Arsenic & Apple Pie to design, produce and sell satirical dolls which did not
2 violate any of the terms of the injunction which I had agreed to. At the time, I was
3 not aware of any existing doll designs by Paul Montwillo that did not violate the
4 Mattel Injunction terms. Thus, in my discussions with Montwillo, he and I
5 specifically agreed that once he was a partner in Arsenic & Apple Pie, that he
6 would design and create new dolls that did not violate the Injunction, which the
7 company would then produce and manufacture in China for sale in the United
8 States. A true and correct copy of the Partnership Agreement is attached as
9 Exhibit 2;

10 5. From July until late December of 1998, I understand that Montwillo worked on
11 new designs for the Trailer Trash doll concept, all expenses being paid for by
12 Arsenic & Apple Pie. In exchange for his efforts, Montwillo would receive half of
13 the company's profits after our production costs were covered;

14 6. In December of 1998, just as we were ready to put the first Trailer Trash doll into
15 production, Montwillo and I converted the Partnership into a Limited Liability
16 Company. My attorney, David Y. Wong, drew up a proposed Operating
17 Agreement based on the Partnership Agreement and after I made some
18 handwritten changes, I gave it to Montwillo to look over;

19 7. In March of 1999, I received back the signed Operating Agreement from
20 Montwillo, with no additional changes, additions or deletions. Specifically,
21 Montwillo did not ask, nor would I have agreed, to remove, alter or insert any
22 language from or into the Operating Agreement that would have given Montwillo
23 the intellectual property rights to the Trailer Trash doll line. It was the clear
24 understanding of both of us that any intellectual property rights to the dolls that
25 may have existed would be the property of Arsenic & Apple Pie, LLC;

26 8. About the same time, I and Montwillo consulted with an attorney about trying to
27 protect our rights in the Trailer Trash doll line by obtaining a copyright or
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1 trademark registration. We were told by the attorney that neither the "Trailer
2 Trash" name nor the dolls produced under the concept could be legally protected
3 under the law. The reason, we were told, was that the Trailer Trash name and
4 concept were too common and well used to be protected. In addition, we were
5 told that dolls of that design would not be original so they could not be protected;

6 9. Production of the first Trailer Trash Doll began in 1999, and in the following
7 years, several other dolls were designed, developed, manufactured and sold by
8 Arsenic & Apple Pie, LLC. In addition to the original Trailer Trash Doll, the
9 Company produced a Blonde Drag Queen and Redhead Drag Queen doll. All of
10 these dolls were manufactured in China, along with boxes also designed by
11 Montwillo. The dolls were assembled and then packaged in China, shipped to
12 the United States, and then sold by Arsenic & Apple Pie, LLC.

13 10. On the back side of the box of each Trailer Trash, Blonde Drag Queen and
14 Redhead Drag Queen doll was an inscription which showed the © symbol
15 followed by the date of manufacture, the words "Arsenic & Apple Pie, Inc", its
16 address and the words "All Rights Reserved." Copies of two such examples are
17 attached to the Declaration of Marc Greenberg as Exhibit 3, were cited in the
18 deposition of Montwillo as Exhibit 5, and are attached to this Affidavit as Exhibit
19 3. Every Trailer Trash doll was sold in a box inscribed with a copyright claim for
20 Arsenic & Apple Pie;

21 11. In or about 2003, after Montwillo had designed two additional Trailer Trash dolls,
22 specifically a Pregnant Talking doll and a male mullet doll, Montwillo and I agreed
23 to put their production on hold until the Company was in better financial
24 condition. Until then, sales from the dolls had not covered production costs and
25 we did not want to incur more debt to produce these two additional dolls;

26 12. Around this time, Montwillo came to me asking if I would buy him out. Montwillo
27 claimed that he was absolutely broke and that his interest in the business had to
28

be worth at least \$16,000. At the time, I felt that since the five dolls and their designs belonged to the Company, that I might be able to turn it around and begin to make a profit on subsequent runs, without his delays. I also I felt sorry for him and in the course of our discussions, I told him that I would buy him out after I looked at the finances of the company. After I saw how much money the Company was losing, and how much it still owed me on my initial loans, I decided that the price we had discussed was excessive and refused to buy his interest in the company. Based on my review of the books of the Company, I felt his interest was virtually worthless, as was mine;

13. I also learned for that Montwillo had filed a Petition in bankruptcy in March of 2002. Arsenic's Operating Agreement provided that the Company would wind up and dissolve in the event of a triggering event, one of which was defined as a member filing a petition in bankruptcy (Section 8.3). Arsenic was thus forced to windup and dissolve as per its Operating Agreement. The dissolution and windup was initiated in June of 2004, and the Company was formally dissolved on July 12, 2004;

14. From the inception of the Arsenic & Apple Pie partnership, through the termination of the Arsenic & Apple Pie, LLC, both Montwillo and I received annual K-1 statements detailing the financial status of the Company each year. In all but one year, the Company failed to show a profit, and in that year, 2000, the Company showed a new profit of only \$6,140. In all the other years that Arsenic & Apple Pie, LLC existed, it incurred a net loss as follows:

1999:	(\$2,096)
2000	\$6,140
2001	(\$32,033)
2002	(\$26,276)
2003	(\$31,662)

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2004 (21,561)

15. At the time of the decision to windup and dissolve, Arsenic's tangible assets consisted primarily of unsold doll inventory with a book value of \$35,763. Arsenic, however, had outstanding liabilities of \$88,283, mostly the unpaid loans owed to me. As stipulated by the Operating Agreement, Arsenic liquidated its assets and offered them for sale to the highest bidder. No bids or offers were received. The debts of the Company were thus paid in order of priority, with third party vendors paid first. After satisfaction of the Company's third party debts, there was still an additional \$70,000 in unpaid loans, so I elected to receive the remaining doll inventory and the intellectual property rights to all five doll designs and concepts in satisfaction of my loans to Arsenic. With no assets remaining, neither Montwillo nor I received anything in consideration of our member interests in Arsenic upon dissolution;
16. On July 15, 2004, I sold Daniel Gibby the "trailer trash doll" inventory of Arsenic and their intellectual property rights that I had received in consideration for my cancellation of my loans. I believe Gibby then transferred the dolls and the intellectual rights to the dolls to Gibby Novelties, LLC, a company he had just formed. Gibby Novelties, LLC has since sold the existing trailer trash doll inventory, barely breaking even. It also further developed and produced two new talking dolls, roughly based on the two abandoned doll concepts acquired from Arsenic, vis-à-vis Tull and Gibby, but with vast differences so as to be entirely distinct and distinguishable;
17. I have reviewed the attached Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment and attest that any and all of the supporting facts set forth therein which I have neglected to mention above are, in fact, true and correct, except as to those matters stated on information and belief and as to same I believe them to be true.

MONTWILLO V. TULL, ET AL. USDC Action No. C 07 3947 SI

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1 I hereby declare and affirm under penalty of perjury under the laws of the United States
2 of America that the foregoing is true and correct and that if called to testify I could and would do
3 so competently and of my own personal knowledge.

4
5 Executed this 2nd day of April, 2008, in Mill Valley, California.

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8 William Tull
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AFFIDAVIT OF WILLIAM TULL IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

EXHIBIT 1

1 QUINN EMANUEL URQUHART & OLIVER, LLP
Adrian M. Pruetz (Bar No. 118215)
2 Crady L. White (Bar No. 169157)
Anna Y. Joo (Bar No. 183148)
3 865 South Figueroa Street, 10th Floor
Los Angeles, California 90017-2543
4 (213) 624-7707

5 Attorneys for Plaintiff
Mattel, Inc.
6
7

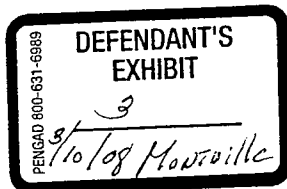
RECEIVED

MAR 21 1997

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN FRANCISCO HEADQUARTERS

11 MATTEL, INC., a Delaware)	CASE NO. C-97-0012 EFL
12 corporation,)	
)	
13 Plaintiff,)	STIPULATED INJUNCTION BY
)	DEFENDANT IN-JEAN-IOUS, INC.
14 v.)	
)	
15 IN-JEAN-IOUS, INC., a)	
16 California corporation; PAUL)	
HANSEN, an individual;)	
17 VARIOUS JOHN DOES, JANE DOES,)	
and XYZ COMPANIES,)	
)	
18 Defendants.)	
)	



1 Plaintiff Mattel, Inc. and defendant In-Jean-Ious,
2 Inc., by their attorneys, hereby stipulate as follows with
3 respect to this action:

4 A. In-Jean-Ious, Inc. and its principals, directors,
5 officers, agents, servants, employees, successors and assigns,
6 and all those in active concert or participation with them, will
7 immediately and permanently cease manufacturing, producing,
8 distributing, circulating, selling, offering for sale,
9 advertising, importing, exporting, promoting or publicly
10 displaying any product or thing bearing any simulation,
11 reproduction, counterfeit, copy or confusingly similar likeness
12 of Mattel's BARBIE® doll line Trademarks, BARBIE® doll line
13 Copyrights, BARBIE® doll line Product or Packaging Trade Dress or
14 KEN® Product Trade Dress, or engaging in any other activity
15 constituting an infringement of Mattel's BARBIE® doll line
16 Trademarks, BARBIE® doll line Copyrights, BARBIE® doll line
17 Product or Packaging Trade Dress, KEN® Product Trade Dress or of
18 Mattel's rights in, or to use or to exploit, said trademarks,
19 copyrights and trade dress or constituting any dilution of
20 Mattel's name, reputation or good will, including but not limited
21 to:

22 1. Imitating, copying or making unauthorized use of
23 Mattel's Registered Trademarks in its BARBIE® line of dolls,
24 which includes the KEN® doll and other BARBIE® doll family
25 and friend dolls, including but not limited to Mattel's
26 Registered Trademarks Nos. 689,055, 726,935, 741,208,
27 768,397, 774,892, 799,068, 884,564, 907,137, 1,000,125,
28 1,461,136, 1,476,981, 1,476,090, 1,476,981, 1,477,905,

1 1,493,304, 1,503,153, 1,506,108, 1,549,304, 1,564,784,
2 1,564,789, 1,567,336, 1,572,146, 1,687,244, 1,710,196,
3 1,773,571, 1,760,729, 1,780,437, 1,897,052, 1,940,997,
4 1,947,330, 1,988,932, 1,995,873, 1,996,483, 2,016,054,
5 2,016,384 and 2,037,634 (hereinafter "Barbie Trademarks").

6 2. Imitating, copying or making unauthorized use of
7 Mattel's Registered Copyrights in the BARBIE® line of dolls,
8 which includes the KEN® doll and other BARBIE® doll family
9 and friend dolls, and packaging for the BARBIE® line of
10 dolls and products associated with the BARBIE® line of
11 dolls, including but not limited to Mattel's Certificates of
12 Copyright Registration Nos. GP 121682, RE 280637, RE 280638,
13 RE 374906, RE 664481, RE 664482, VA 121837, VA 121923, VA
14 157488, VA 157489, VA 214712, VA 222223, VA 222225, VA
15 226313, VA 286513, VA 287403, VA 290561, VA 290562, VA
16 297202, VA 323785, VA 351455, VA 370521, VA 373201, VA
17 376038, VA 377302, VA 426477, VA 454723, VA 623672, VA
18 639942, VA 722238 (hereinafter "Barbie Copyrights").

19 3. Imitating, copying or making unauthorized use of
20 Mattel's BARBIE® doll line Packaging Trade Dress, including
21 but not limited to the following elements:

22 (a) background or trim in specific shades of
23 pink;

24 (b) the name of the products in yellow and/or
25 white words;

26 (c) the BARBIE® doll line trademarks scripted
27 in white.
28

1 4. Imitating, copying or making unauthorized use of
2 Mattel's BARBIE® doll line Product Trade Dress defined by at
3 least the following elements:

4 (a) the unique proportions of the BARBIE®
5 doll's hour-glass shaped body, and

6 (b) the BARBIE® doll's particular set of facial
7 features which alert the public as to the source of the
8 BARBIE® doll as Mattel.

9 5. Imitating, copying or making unauthorized use of
10 Mattel's KEN® Product Trade Dress defined by at least the
11 following elements:

12 (a) a particular body shape, and

13 (b) the KEN® doll's particular set of facial
14 features which alert the public as to the source of the
15 KEN® doll as Mattel.

16 6. Assisting, aiding or abetting any other person or
17 business entity in engaging or performing any of the
18 activities referred to in subparagraphs 1 through 5 above.

19 B. In consideration of this Stipulated Injunction,
20 Mattel hereby dismisses its claims against defendant In-Jean-
21 Ious; provided, however that this Court will retain jurisdiction
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1
2 over In-Jean-Ious to the extent necessary to enforce this
3 injunction and to determine any contempt issues which may arise
4 concerning this Order.

5 IT IS SO STIPULATED.

6
7 Dated: March 18, 1997

8 QUINN EMANUEL URQUHART & OLIVER, LLP

9
10 By Adrian M. Pruetz
11 Adrian M. Pruetz
12 Attorneys for Plaintiff
13 Mattel, Inc.

14 Dated: March 19, 1997

15 MORGENSTEIN & JUBELIRER

16 By Lewis I. Barr
17 Lewis Barr
18 Attorneys for
19 Defendant In-Jean-Ious, Inc.

20 [PROPOSED] ORDER

21 Having read and considered the foregoing Stipulation of
22 the parties and good cause appearing therefor,

23 IT IS SO ORDERED.

24 MAR 27 1997

25 EUGENE F. LYNCH

26 Honorable Eugene F. Lynch
27 U.S. DISTRICT COURT JUDGE
28

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____

_____ and know its contents

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner _____ ☐ a _____ of _____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19____, at _____, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name

Signature

PROOF OF SERVICE

1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is: 865 South Figueroa Street, 10th Floor, Los Angeles, California 90017

On April 1, 1997, I served the foregoing document described as STIPULATED INJUNCTION BY DEFENDANT IN JEAN-IOUS, INC.

_____ on interested parties in this action
☐ by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:
☒ by placing ☐ the original ☒ a true copy thereof enclosed in sealed envelopes addressed as follows:

Lewis D. Barr, Esq.
 Morgenstein & Jubelirer
 One Market Plaza
 Spear Street Tower, 32nd Floor
 San Francisco, California 94105

Denise DeMory, Esq.
 Keker & VanNest LLP
 710 Sansome Street
 San Francisco, California 94111

☒ BY MAIL

☐ • I deposited such envelope in the mail at _____, California.
 The envelope was mailed with postage thereon fully prepaid.

☒ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

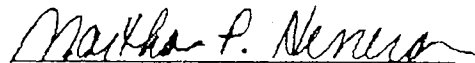
Executed on April 1, 1997, at Los Angeles, California

☐ ••(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.
 Executed on _____, 19____, at _____, California.

☐ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.
☒ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Martha P. Herrera

Type or Print Name



Signature

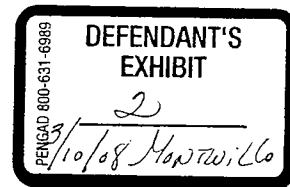
STUART'S EXHIBIT TIMEBAVER (REVISED 6/1/88)
 NEW DISCOVERY LAW 2030 AND 2081 CCP
 (May be used in California State or Federal Courts)

*BY MAIL SIGNATURE MUST BE OF PERSON DEPOSITING ENVELOPE IN MAIL SLOT, BOX, OR BAG
 **FOR PERSONAL SERVICE SIGNATURE MUST BE THAT OF MESSENGER

IN SAN DIEGO COUNTY LOCAL RULE 6.7 REQUIRES "ALL PROOFS OF SERVICE FILED WITH THE COURT AS OF JULY 1, 1990" MUST SPECIFY THE NAME OF THE PARTY SERVED, THE NATURE AND STATUS OF HIS/HER INVOLVEMENT IN THE CASE, I.E. PLAINTIFF DEFENDANT CROSS COMPLAINANT, ETC., AND THE NAME, ADDRESS AND PHONE NUMBER OF HIS/HER COUNSEL OF RECORD

EXHIBIT 2

Partnership Agreement



This contract is a binding agreement between William Tull Jr. and Paul Montwillo (d.b.a. Hansen), concerning their responsibilities in their partnership in the business known as "Arsenic and Apple Pie".

William Tull Jr. will be primarily responsible for the financial investment of startup costs, and upkeep until the business shows a profit. Mr. Tull is also responsible for bookkeeping, sales, and distribution.

Paul Montwillo will be primarily responsible for Art Direction, Design, and Advertising of the product line. This would include such things as: corporate identification, product design, package design, web site design and maintenance, and print advertising.

Both parties will share the responsibility of marketing, and any of the fore-mentioned responsibilities, should a need arise.

In return for their efforts each party shall receive 50% of the net profits from the business, after Mr. Tull has been returned his initial investment plus interest at the current a.p.r.

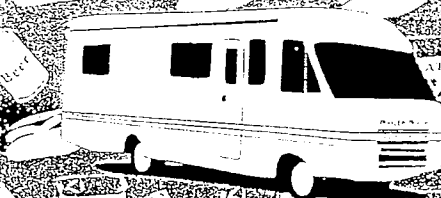
If either party should decide not to fulfill his designated responsibilities within the partnership, the remaining partner shall retain exclusive rights to all the products of their combined efforts until that point in time.

This contract will remain in effect for two years from date signed, or until a limited liability corporation has been formed.

William Tull Jr. 7/16/97
William Tull Jr. date

Paul Montwillo 7/16/97
Paul Montwillo date

EXHIBIT 3



If your idea of romance involves a hot, sexy, no-nonsense
 cock that's ready to go down on you, you're looking for
 Do you think the stock market should have come around to
 ready to go down on you?

...doll for you. ...these goods, then ...the...

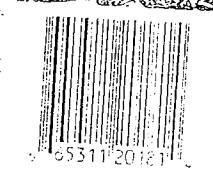
Received in [redacted] station [redacted] room, [redacted] in the [redacted] of a [redacted]
 [redacted] was [redacted] the [redacted] the [redacted] park [redacted] on [redacted] night
 This little honey was [redacted]

[illegible][illegible]

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**Manufactured In China for
Arsenic & Apple Pie™
40 De Burgh Drive
San Anselmo, CA 94960**

www.italiangold.com



...is a small, and extremely
...become... children... mass



**DEFENDANT'S
EXHIBIT**

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PENG-3/10/08 Mow. w. 110

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